Supreme Court, U. S.
FILED
OCT 26 1977
MICHAEL RODAK, JR., CLERK

No. 77-254

In the Supreme Court of the United States

OCTOBER TERM, 1977

DISCOUNT COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

BARBARA ALLEN BABCOCK,
Assistant Attorney General,

RONALD R. GLANCZ,
ROBERT KAPLAN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-254

DISCOUNT COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Claims (Pet. App. A-1) is reported at 554 F. 2d 435. The opinion of the Department of Agriculture Board of Contract Appeals (Pet. App. A-2) is reported at 74-2 BCA para. 10,775. The Board's opinion on denial of motion for reconsideration is reported at 74-2 BCA para. 10,855.

JURISDICTION

The judgment of the Court of Claims was entered on April 20, 1977, and a timely motion for rehearing was denied on May 27, 1977. The petition for a writ of certiorari was filed on August 15, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the decision of the Board of Contract Appeals that petitioner's contract was properly terminated for default was supported by substantial evidence.

STATEMENT

This suit arose under the Wunderlich Act, 68 Stat. 81, 41 U.S.C. 321-322, for review of a decision by the Department of Agriculture Board of Contract Appeals holding that the termination of petitioner's contract for default was proper. Petitioner seeks review of the Court of Claims' decision granting summary judgment in favor of the government.

The facts are set forth in the opinion of the Court of Claims (Pet. App. A-1, pp. 2-3). In May 1968, petitioner entered into a contract with the Forest Service to construct a boat launching ramp, parking lot, and campgrounds at what was to be the Mona Campground and Lookout Boating Site in the Willamette National Forest, Oregon. The notice to proceed was issued on June 24, 1968 and construction was to be completed within 180 days. Petitioner initiated construction, but by October 1968 the contracting officer had decided that petitioner's work in the parking area and boat ramp did not comply with specifications because of unsuitable materials and construction methods. In December 1968, work was suspended due to winter weather.

Prior to the resumption of work for the 1969 season, petitioner and the government's representative had two conferences to plan the remaining work under the contract. Because the boat ramp area would be partially covered by the rising water level of Lake Mona Reservoir during the contruction season, petitioner agreed to wait

until September 1969 to work on the unacceptable structures.[1] Petitioner also agreed to begin construction at the campground on June 2, 1969, since it was not affected by the rising water level. On June 2, the contracting officer submitted to petitioner Change Order No. 3, which designated an alternative borrow site,[2] and also gave petitioner a partial work resumption order for the campground construction. Petitioner refused to sign the order on June 10, 1969, alleging that problems with the government's restaking of the area and certain other difficulties prevented it from proceeding. The work order was reissued on June 24, 1969. Nevertheless, petitioner did not begin work on the campground.

On July 18, 1969, Change Order No. 5 was issued effecting a negotiated "as is" acceptance of the nonconforming boat ramp and parking lot. On July 14, 1969, the Forest Service had issued a full work resumption order, effective July 15, which anticipated the "as is" acceptance and required work to resume on all other phases of the project, particularly the campground. However, petitioner did no substantial amount of work on the job site during the summer of 1969.

Because of this lack of progress, the Forest Service, on July 23, 1969, sent petitioner a ten-day cure notice demanding that work be resumed with such diligence as to insure the project's completion within the contractual time remaining. Since petitioner failed to resume work

---

[1]Contrary to its assertions, petitioner has never pointed to any evidence in the administrative record to show that it had requested work resumption earlier than June 1969.

[2]A "brorrow site" is a place from which fill material may be removed. The original borrow site designated in the contract apparently had become partially covered by water from the reservoir.

and did not provide a requested schedule for completion of the remaining work, the contract was terminated for default on August 12, 1969.[3]

On petitioner's appeal from the default termination, the Agriculture Department Board of Contract Appeals found that petitioner failed to perform sufficient work during the summer of 1969 to assure completion of the project within the contractual time, that this failure was unexcused, and that the default termination accordingly was justified (Pet. App. A-2).

The Court of Claims, with one judge dissenting, granted summary judgment in favor of the government, holding (Pet. App. A-1, pp. 4-5; footnote omitted):

> * * * the record demonstrates that the Board could allowably find that, despite two resumption-of-work orders and plaintiff's assurances that work would soon resume, no substantial progress was actually made on campground construction during the 1969 work season. As of August 4, 1969—weeks after the order to resume work had been issued and a day after the 10-day notice had expired— plaintiff had neither begun more-than-piddling construction activities at the campground, nor assured the Government that it could meet the completion deadline * * *. Discount did do some minor work on other aspects (*e.g.* on a

[3]A further dispute between the parties arose in June 1969 when the government submitted Payment Invoice No. 6 representing the estimated amount due for work performed the previous year. Petitioner disagreed with the estimated percentage of the work completed and refused to sign; when the parties finally agreed on August 4 as to the amount due, petitioner was in default of the ten-day cure notice, and the government decided that the contract was likely to be terminated. Accordingly, payment was withheld to protect the surety (Pet. App. A-1, p. 4).

> waterline and some plumbing) but there is very little doubt that it performed little or nothing on the central component—the clearing and grading of the campground.

ARGUMENT

The essentially factual question presented here, whether petitioner had adequate justification for its failure to make progress on the contract, raises no issue of general importance and does not warrant further review.

1. Petitioner argues first (Pet. 7-11) that Change Order No. 3 designating an alternative borrow site was merely a proposal that it did not accept[4], that a further unilateral order by the contracting officer was necessary before the change could become effective, and that had it used the alternative site without such an order, it would have waived its right to an equitable adjustment. The Court of Claims correctly dismissed this contention as "wholly divorced from the realities of the situation" (Pet. App. A-1, p. 7). The designation of an alternative borrow site was not even among the reasons mentioned by petitioner when it refused to sign the partial work resumption notice on June 10, 1969 (App. Exh. 8).[5] Furthermore, petitioner signed the work resumption notice on June 24 (App.

[4]Petitioner returned the change order unsigned, claiming that it should include an upward adjustment for higher transportation costs (Pet. App. A-1, p. 6).

[5]App. Exh. refers to the exhibits attached to Defendant's Request for Review of Trial Judge's Recommended Decision and Conclusions of Law, filed in the Court of Claims, a copy of which is being lodged with this Court.

Exhs. 7, 9), with no reservation regarding the borrow site.[6] As the Court of Claims noted (Pet. App. A-1, p. 7):

> * * * plaintiff was aware, or should have known, that it could have protected its right to an equitable adjustment by simply saying so—that it would comply with Change Order Number 3 but would still pursue its alleged right to an increase in the contract price.[7] Plaintiff never asked for the additional unilateral order it now calls an absolute prerequisite, nor did it tell defendant, when it was being repeatedly pressed in the summer of 1969 to proceed with the

[6]Contrary to petitioner's contention (Pet. 15-17), the finding of the Court of Claims that the alternate borrow site was adequate is not clearly erroneous. The opinion of the completing contractor was that the material was unsuitable, but the government's engineers disagreed (Tr. 173, 173-A). ("Tr." refers to the transcript of proceedings before the Agriculture Department Board of Contract Appeals.) In any case, at the pre-work conference on May 14, 1969, the alternate site was examined and no objection was made by petitioner (App. Exh. 14). Petitioner's subsequent objection to the alternate site was not based on the ground that it was unusable, but on possible higher transportation costs (Pet. App. A-1, p. 6), and the contracting officer's administrative representative testified that beginning on or about June 23, 1969, all phases of the project were open to petitioner to resume work, with the possible exception of burning operations (Tr. 183).

[7]Petitioner contends (Pet. 11) that this statement fails to recognize an alleged policy of federal procurement agencies to attempt to negotiate bilateral changes before resorting to the power under the changes clauses. The record before the Board contains no evidence of such a policy. To the contrary, Article 3(b) of the Supplemental General Provisions of the contract provides that any written or oral order from the contracting officer causing a change "shall be treated as a change order under this clause, provided that the Contractor gives the Contracting Officer written notice stating the date, circumstances, and source of the order and that the Contractor regards the order as a change order."

> work, that the main obstacle was that it could not safely use the alternate borrow site without such an additional order.

The Court of Claims correctly concluded that "this excuse, the major one proffered us, is an afterthought, not a real justification for failing to proceed with the campground work in the 1969 summer" (Pet. App. A-1, p. 7).

2. Petitioner also contends (Pet. 11-13) that it was justified in failing to make progress because of alleged wrongful withholding of progress payments. But this, too, is an entirely abstract claim. The Board determined that there was no evidence before it showing a connection between the failure to prosecute the work and financial difficulty arising out of government action on the contract (Pet. App. A-1, p. 9). The Court of Claims noted that "Discount did not directly contend, either in its brief or on oral argument before us, that the Government's failure to pay the full amount requested by plaintiff [under Payment Invoice No. 6] precluded it from proceeding during the 1969 construction season" (Pet. App. A-1, p. 9). Indeed, petitioner does not contend in this Court that there is an actual causal relationship between the withholding and its inability to perform. The Court of Claims correctly concluded (*ibid.*): "The non-payment here was not as a result of the Government's wrongful withholding of money clearly due but rather resulted from a good faith controversy, which was handled through appropriate channels, over the amount owed." See also *Litchfield Mfg. Corp.* v. *United States*, 338 F. 2d 94 (Ct. Cl.).[8]

[8]Although petitioner contends (Pet. 12) that the Court of Claims erroneously decided that the government was justified in withholding the amount agreed upon as due for the benefit of the surety, the court

3. Petitioner erroneously states (Pet. 14) that the termination was wrongful because "[a]ll parties * * * recognized that adequate time remained under the contract for its timely completion." The government has not conceded that petitioner had the ability to complete performance on time (Tr. 182) and no such finding was made. In any case, petitioner's claims regarding the possibility of timely completion are irrelevant, since the contract was terminated for lack of diligence, not impossibility of completion (Pet. App. A-1, p. 8).[9]

---

actually found it unnecessary to decide this issue since, as it correctly observed, "* * * the failure to pay after August 4th did not trigger plaintiff's default * * *" (Pet. App. A-1, pp. 9-10).

[9]Thus, contrary to the understanding of the trial judge (and apparently the dissenting judge in the Court of Claims), petitioner was not terminated for a technical failure to provide a work schedule but "on the over-all evidence of Discount's failure to prosecute diligently its work under the contract" (Pet. App. A-1, p. 8). As the court pointed out (*ibid.*), once lack of diligence has been found, it is proper "to rely upon cases involving abandoned or repudiated contracts, as well as other decisions similar to the one at bar which have upheld 'failure to make progress' terminations. See, *e.g.*, *Universal Fiberglass Corp.* v. *United States*, 210 Ct. Cl.___, 537 F. 2d 393 (1976); *American Dredging Co.*, ENGBCA 2920, 72-1 BCA para. 9316, aff'd, 207 Ct. Cl. 1010 (1975)." Contrary to petitioner's assertions (Pet. 14), neither decision relied upon by the court interpreted a termination clause like that involved here to permit termination only if performance within the contract period was literally impossible.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

BARBARA ALLEN BABCOCK,
Assistant Attorney General.

RONALD R. GLANCZ,
ROBERT KAPLAN,
Attorneys.

OCTOBER 1977.